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SUPREME COURT, U.S.

No. 79-6584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

In the Matter of

SHERYL ANN TRAPP, DEE ANN TRAPP,
and DUANE EDWIN TRAPP, Minors,

ROBERT EMERY TRAPP, Father,
LINDA MAE TRAPP, Mother and
Appellant.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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ARGUMENT

I.

CONTRARY TO THE VIEW OF THE MISSOURI SUPREME COURT AND THAT OF THE CASES RELIED ON BY APPELLEE, THE NEGLECT STANDARDS OF §211.-031 RSMo CAN BE DEFINED IN SPECIFIC TERMS WHICH CURE THE VAGUENESS AND OVERBREADTH OF THE MISSOURI STATUTE AND ACCOMMODATE THE CONSTITUTIONAL RIGHTS AND INTERESTS OF THE PARENTS, THE CHILD, AND THE STATE.

As heretofore shown in appellant's Jurisdictional Statement (pp. 27-30), the neglect standards embodied in §211.031 RSMo 1969 are susceptible to such multifareous interpretations that they do not, and did not here, give fair warning of what parental conduct is proscribed, and they afford so much discretion in their application that they permit, and permitted here, the arbitrary and discriminatory separation of the child from the parents. As acknowledged in Minor Children of F.B. v. Caruthers, 323 S.W.2d 397 (Mo. App. 1959), which the Missouri Supreme Court approved and followed in this case (App. A, pp. 10-11), §211.031 RSMo "is indeed broad," and it grants the juvenile court "wide judicial discretion." Id. at 400, 401.

The Missouri Supreme Court nevertheless held that the statute is not unconstitutionally vague and overbroad, and it did so primarily on the ground that child neglect is incapable of being de-

fined in more definite and certain terms.[1] But the contention that such broad and vague neglect standards are a necessity, and even a virtue, is not well founded. Demonstrably, such broadness and vagueness not only should but can be cured by defining the grounds for state intervention in terms of specific harms to the child so as to permit the State to intervene only when the child is and will continue to be imminently subject to a substantial risk of serious harm as a result of the culpable conduct of his parents, and more harm is likely to befall the child by remaining with his parents than by being separated from them—as has been done in the American Bar Association Juvenile Justice Standards Project's Standards Relating to Abuse and Neglect (1977), pp. 1-7, 9-29, 37-44, 48-64, 119-129.

Standards 1.1, 1.2, 1.3, 2.1, and 2.2 of the ABA Standards (Id. at 9-11) provide as follows:

> "1.1 Family Automony. Laws structuring a system of coercive intervention on behalf of endangered children should be based on a strong presumption for parental autonomy in child rearing. Coercive state intervention should occur only when a

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[1] The Missouri Supreme Court also indicates approval of the conclusion of the Caruthers Court that §211.031 RSMo is not unconstitutional because it is in effect but a restatement of the broad discretionary jurisdiction long exercised by courts in equity to enforce the State's "paramount" power to protect and promote the well-being of children under the early concept of parens patriae. 323 S.W.2d at 400-401. However, as this Court observed in In re Gault, 387 U.S. 1, 16 (1967), this Latin phrase "proved to be a great help to those who sought to rationalize the exclusion of juveniles [and their parents] from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." The phrase was taken from chancery practice where, however, it was used to describe the power of the Crown which the chancery court exercised in actions between private parties, not for the purpose of protecting children from neglect, but to secure and preserve their estates and to protect their person only in so far as their education and marriage were concerned. See Cogan, Juvenile Law, Before and After the Entrance of "Parens Patriae", 22 S.Car.L.Rev. 147 (1970); Rendleman, Parens Patriae: From Chancery to the Juvenile Court, 23 S.Car.L.Rev. 205, 207-210, 219 n. 76, 255-259 (1971). In fact, as recognized in Wellesley v. Wellesley, 2 Bligh N.S. 124, 4 English Reports (Reprint) 1078, 1083 (1828), on which the Caruthers Court purports to rely, the chancery court had no jurisdiction to protect the person of the child from mistreatment or abuse.

Thus the concept of parens patriae was misinterpreted and misapplied when used in cases such as Ex parte Crouse, 4 Whart 9, 11 (Pa. 1839), on which Caruthers relies, to support the proposition that the State has almost plenary power to intervene in parent-child relations. See Rendleman, supra, 23 S.Car.L.Rev. at 218-219. Indeed, as held in Gault, supra, 387 U.S. at 30, "the Juvenile Court Judge's exercise of the power of the state as parens patriae [is] not unlimited." Cf. Wisconsin v. Yoder, 406 U.S. 205, 229-230, 232-234 (1972).

child is suffering specific harms as defined in Standard 2.1.

* * *

"1.2 Purpose of Intervention. Coercive state intervention should be premised upon specific harms that a child has suffered or is likely to suffer.

"1.3 Statutory Guidelines. The statutory grounds for coercive intervention on behalf of endangered children:

A. Should be defined as specifically as possible;

B. Should authorize intervention only when the child is suffering, or there is a substantial likelihood that the child will imminently suffer, serious harm;

C. Should permit coercive intervention only for categories of harm where intervention will, in most cases, do more good than harm.

"2.1 Statutory Grounds for Intervention. Courts should be authorized to assume jurisdiction in order to condition continued parental custody upon the parents' accepting supervision or to remove a child from his/her home only when a child is endangered in a manner specified in subsections A.-F.:

A. A child has suffered, or there is a substantial risk that a child will imminently suffer, a physical harm, inflicted nonaccidentally upon him/her by his/her parents, which causes, or creates a substantial risk of causing disfigurement, impairment of bodily functioning, or other serious physical injury;

B. A child has suffered, or there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other seriour physical injury as a result of conditions created by his/her parents or by the failure of the parents to adequately supervise or protect him/her;

C. A child is suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the child's parents are not willing to provide treatment for him/her;

D. A child has been sexually abused by his/her parent or a member of his/her household (alternative: a child has been sexually abused by his/her parent or a member of his/her house-

hold and is seriously harmed physically or emotionally thereby);

E. A child is in need of medical treatment to cure, alleviate, or prevent him/her from suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment;

F. A child is committing delinquent acts as a result of parental encouragement, guidance, or approval.

"2.2 Need for Intervention in Specific Case. The fact that a child is endangered in a manner specified in Standard 2.1 A.-F. should be a necessary but not sufficient condition for a court to intervene. In order to assume jurisdiction, a court should also have to find that intervention is necessary to protect the child from being endangered in the future. This decision should be made in accordance with the standards proposed in Part VI."

Thus it appears that neglect standards can be devised which comport with the holding in Alsager v. District Court of Polk County, 406 F.Supp. 10, 21 (S.D.Ia. 1975), that "Due process requires the state to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in [intervening in] the parent-child relationship," and which, at the same time, do not diminish the rights of children, nor prevent the State from exercising its right and duty to protect children from harm. In other words, as the ABA Standards demonstrate, standards of neglect can be defined in specific terms which would cure the vagueness and overbreadth of the Missouri statute (§211.031 RSMo) and accommodate the constitutional rights and interests of the parents, the child and the State.

II.

THE MISSOURI SUPREME COURT IS ALSO IN ERROR IN FAILING TO RECOGNIZE THAT THE MISSOURI NEGLECT STATUTES (§§211.031 AND 211.181 RSMo) ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THEY DENY SUBSTANTIVE DUE PROCESS IN THAT THEY DO NOT REQUIRE THE STATE TO SHOW THAT THE CHILD IN IMMINENTLY SUBJECT TO A SUBSTANTIAL RISK OF SUFFERING SERIOUS HARM DUE TO THE CULPABLE CONDUCT OF HIS PARENTS AND

THAT MORE HARM IS LIKELY TO BEFALL THE CHILD BY BEING PERMITTED TO REMAIN WITH HIS PARENTS THAN BE BEING SEPARATED FROM THEM, SO AS TO GIVE THE STATE THE COMPELLING STATE INTEREST NECESSARY TO JUSTIFY DEPRIVING THE PARENTS OF THE FUNDAMENTAL RIGHT TO THE CUSTODY OF THEIR CHILDREN.

Appellee does not specifically[2] address this point which, as shown in appellant's Jurisdictional Statement (pp. 30-34), is supported by the holding of the federal district court in Alsager, supra, 406 F.Supp. at 22-24 (S.D.Ia. 1975); the Eighth Circuit on appeal in Alsager, supra, 545 F.2d 1137 (8th Cir. 1976); the three-judge district court in Roe v. Conn, 417 F.Supp. 769, 777-779 (M.D.Ala. 1976); the three-judge district court in Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179, 1192 n. 14, 1193-1194 (S.D.Tex. 1977), rev'd on procedural grounds, 442 U.S. 415 (1979); and the ABA Standards Relating to Abuse and Neglect, ante at 2-4.

As recognized by the Supreme Court of Oklahoma in applying the holding of Alsager, Roe v. Conn, and Sims, in In re Sherol A.S., 581 P.2d 884, 888 (Okl. 1978):

> "* * * The purpose of termination is to protect children from HARM suffered by reason of either neglect or the intentional actions of their parents. Termination is not a means by which the State . . ., through its juvenile courts . . ., can exact conformity from its citizen-parents through the imposition of an 'acceptable' common value system and 'lifestyle'. There is no authority in [the Oklahoma] Juvenile Code which allows the State to interfere with family relationships where harm to children is not involved. This is, of course, a notion of constitutional dimension. The fundamental integrity

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[2] In his Motion to Affirm (at 18-19), appellee quotes sweeping language from Prince v. Massachusetts, 321 U.S. 158, 165, 167, 168 (1944), to the effect that the State as parens patriae has a wide range of power for limiting parental freedom and authority in things effecting the child's welfare. But as pointed out in Wisconsin v. Yoder, 406 U.S. 205, 229-230 (1972), the Court has since taken great care to confine Prince to a narrow scope, i.e., to conduct or actions which pose a "substantial threat" of "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare . . .." In other words, "the power of the parent [to direct the upbringing of his children] may be subject to limitation under Prince [only] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burden." (Emphasis added.) 406 U.S. at 233-234.

of the family unit, which has found protection in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Ninth Amendment, is subject to intrusion and dismemberment by the State only where a 'compelling' State interest arises and protecting the child from harm is the requisite State interest." (Emphasis by the Court.) (Citations omitted.)

The Oklahoma Court then stated that the evidence showed no "actual or imminent harm" to the children, and concluded (Id. at 890) that "these children will enjoy fewer material, educational and cultural advantages than many of their peers—but these facts do not rise to the threshold of harm prerequisite to severing the natural and legal bonds of parent and child."

The Missouri neglect statutes provide no such restrictive standard, and by the same token, require no threshold of harm. On the contrary, §211.011 RSMo (App. E, p. 1) declares that the purpose of the Juvenile Courts Chapter "is to facilitate the care, protection and discipline of children," and proceeds to speak in expansive terms of removal "to the end that each child coming within the jurisdiction of the juvenile court shall receive such care . . . as will conduce to the child's welfare and the best interest of the state." Indeed, §211.171 RSMo (App. E, p. 2) provides that the juvenile court judge shall determine the procedure to be followed at the hearing, and he "may inquire into the habits, surroundings, conditions and tendencies of the child to enable the court to render such order or judgment as will best promote the welfare of the child and carry out the objectives of §§211.011 to 211.431."[3]

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[3] The "best interest of the child" is a phrase which has been borrowed from divorce law where it is entirely appropriate in determining with which of the parents, who have an equal but unshareable right to custody, the child will be better off; but the phrase has no valid application in custody litigation between a parent and the State. Simmons v. Smith, 366 P.2d 875, 876 (Ore. 1961); Roe v. Conn, supra, 417 F.Supp. at 779 n. 12; In re T.M.M., 267 N.W.2d 807, 812 (N.D. 1978). Indeed, if the test for removal of a child from his parents was whether he would be "better off" with someone else, then there could be a massive reallocation of children to new parents.

As pointed out in the Commentary, the ABA Standards Relating to Abuse and Neglect, supra, at 120-121, reject the "best interest" test in neglect proceedings for a number of reasons: "First, no legislature has provided statutory guidelines that spell out the factors a court should consider in determining the child's best interest. Obviously, this term may mean different things. * * * In the absense of legislative definition, there is considerable variation among judges in applying the test. Decisions may reflect indi-

Thus it appears that the Missouri neglect statutes on their face permit, and permitted here, the removal of children from their parents without any showing that the children are suffering or will be imminently subject to a substantial risk of suffering serious harm due to the culpable conduct of their parents, if left with them. By the same token, the Missouri statutes are unconstitutional on their face and as applied here because they deny substantive due process in that they permit, and here permitted, parents to be deprived of their fundamental right to the custody of their children without the showing of a level of harm sufficient to give the State a "child-protection interest" compelling enough to justify such deprivation of constitutional rights.

CONCLUSION

For these reasons together with those heretofore presented, this Court should note probable jurisdiction and set this case for plenary briefing and argument.

Respectfully submitted,

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3/ (cont'd)

vidual judges' views of a proper upbringing. As a result, there has been unequal treatment of parents and children, discrimination on the basis of race and social class, and judicial decisions based on value judgments not commonly held by society or approved by the legislature."

Indeed, in Smith v. Organization of Foster Families, 431 U.S. 816, 834 n. 35 (1977), this Court observed that judges "may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." And in Quilloin v. Walcott, 434 U.S. 246, 255 (1978), this Court stated: "We have little doubt that the Due Process Clause would be offended '[i]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"

Compare State v. Robert H., 393 A.2d 1387, 1390, 1391 (N.H. 1978), where the Supreme Court of New Hampshire stated that ". . . to hold merely that inadequate parenting, absent specific harm to the children, is sufficient to terminate parental rights in the 'best interest of the child' is too vague a concept and places undue emphasis on the parental conduct rather than any harm to the child," and held that, "absent a showing of specific harm to the children, 'growing up in a so-called disadvantaged home is not a sufficient basis for coercive intervention [by the State].'"

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